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BEFORE THE BOARD OF OIL, GAS, AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

In the Matter of the Petition of Genwal Resources, Inc. for Review of Division Order DO- 10A, Crandall Canyon Mine	**DIVISION'S RESPONSE TO GENWAL'S BRIEF OPPOSING AMENDED DIVISION ORDER-10A** Docket No. 2010-026 Cause No. C/015/0032

The Division of Oil, Gas and Mining ("Division"), hereby files this Response to Genwal Resources, Inc.'s ("Genwal") Brief Opposing Amended Division Order-10A.

Introduction

Enforcement and Procedural History:

In January of 2008, approximately six months after the tragic accident and collapse of the Crandall Canyon Mine, water began to flow from the mine portal into Crandall Creek at a rate of approximately 400 gallons per minute. This flow was unexpected. Although water had been pumped from the workings as part of mining operations prior to the accident, the mine as designed and permitted was not expected to have a gravity discharge of water.

In October 2008 the water discharging into Crandall Creek was observed to have concentrations of iron that exceeded the permitted water quality limits. The high iron concentrations continued and a notice of violation ("NOV") was issued to Genwal by the Utah Division of Water Quality ("DWQ") on February 26, 2009. On August 10, 2009 DWQ issued a second NOV to Genwal. At the time of this second NOV, the substrate of Crandall Creek was stained a rust-orange color. The Division of Oil, Gas and Mining also issued a NOV to Genwal on August 10, 2009 for the continued violation of the water quality standards and for failing to minimize damage to the hydrologic balance. This NOV was terminated on January 1, 2010 when the Division approved an operational water treatment system.

In an attempt to remedy the situation, the Division originally issued its Division Order 9 A ("DO 9A") on November 24, 2009 and revised it on December 21, 2009. This DO-9A required Genwal to submit a revision to its approved mining and reclamation plan ("MRP") to reflect the pollutional discharge and treatment system and to provide a bond to cover the operational costs of treatment. The revision extended the compliance deadlines until March 1, 2010 to submit a revised MRP and until March 18, 2010 to submit and adequate bond. On March 1, 2010 Genwal replied by providing a hydrologist's opinion that the pollution level of the discharge was a temporary condition. Genwal offered that it would continue treatment until the date of permit renewal in 2013 and would agree to evaluate the need for a permanent treatment facility at that time. The Division advised Genwal that this was not acceptable response to the requirements set forth in DO-9A and conducted its own hydrologic evaluation of the mine discharge and the potential for the pollution to continue.

The Division completed its Hydrologic Evaluation report on June 7, 2010.[1] This evaluation concluded that there was no reason to expect the mine-water discharge to cease and that it was likely that the high iron concentrations would continue to require chemical treatment to meet water quality standards for a long-time, perhaps in perpetuity. Based on this report the Division issued Division Order 10A ("DO-10A") on August 16, 2010 requiring Genwal take certain steps over a period of time to address the continuing pollutional discharge, including modifying the MRP and posting an initial bond in an amount sufficient to cover the costs of long-term treatment by October 15, 2010. The annual treatment costs were estimated to be $320,000.00. DO-10A provided that the initial bond amount would be replaced based on more detailed costs of a treatment facility and costs of treatment.

Genwal filed its appeal of DO-10A on September 16, 2010. The parties agreed to extend the time for posting a bond "until 30 days after the Board's final decision in this matter." By Stipulated Order entered on October 27, 2010 the Board determined to separate the issues presented by the appeal into three distinct questions to be decided at separate hearings. The first hearing was scheduled to determine whether the Division had the legal authority under the Utah Coal Mining and Reclamation Act to require Genwal to post a bond to cover the potential costs of the long-term treatment of the discharge water. For the purposes of this first hearing the parties stipulated that the findings as set forth in the Division Order-10A could be assumed to be true (November 15, 2010 Statement of Undisputed Facts). The parties filed briefs prior to the December Board Hearing and presented arguments at the January 11, 2011 Board Hearing.

[1] An Update was completed June 2, 2011 but is being withheld pending the evidentiary hearing.

Good Faith but Unsuccessful Negotiations:

At the February Board Hearing, while the Board had taken the decision on legal issues under consideration, the Board asked the parties to take 90 days to see if they could reach a negotiated settlement. The parties met many times, both with and without technical staff; however despite the parties' good faith efforts to come to a resolution, the negotiations were ultimately unsuccessful. At the May 25, 2011 Board Hearing in Price, Utah, the Division advised the Board that negotiations had failed to resolve the dispute; there were fundamental and irreconcilable differences between the positions of the parties; and asked the Board how it wished to proceed. The Board ordered that unless there was a settlement agreement the parties should appear at the June Board Hearing prepared to address the second scheduled hearing on hydrologic issues. During this post-negotiation period the parties continued to meet and exchange communications, but did not reach an agreement.

Towards the end of the post- negotiation period the Division advised Genwal of its intentions to seek leave to amend DO-10A to add an option to allow bonding with an incremental increase in the amount that would be conditional on the water quality of the discharge. On June 8, 2011 Genwal filed its Motion to Continue the Evidentiary Hearing set for the June Board Hearing. In its motion Genwal objected to proceeding with the evidentiary hearing without the Board first issuing a decision on the legal authority for DO-10A. On June 9, 2011 the Division filed its Response to Genwal's Motion to Continue and a Motion for Leave to Amend the Division Order-10A. The Division's Motion outlined the proposed amendment, which required Genwal to make a written

commitment to: 1) provide an initial payment or bond in an amount based on a multiple of the actual annual water treatment costs; and 2) commit to incremental adjustments to the bond that is based on the levels of the iron concentrations. The Division's motion also stated that the proposed amendment would, subject to Board approval, provide an option to satisfy Genwal's requirement under DO-10A's to post a bond amount sufficient to cover the long term treatment costs.

Genwal consented to the Division's right to modify DO-10A, subject to its right to preserve its due process rights to make objections and have a hearing regarding the amended portions of the Order. On June 16, 2010, the Board granted the Division's Motion to Amend the Division Order and continued the hearing set for June until the August 24, 2011 Board Hearing.

The Division met with Genwal since the filing of its Amended Division Order on June 20, 2011, but significant differences still continue to prevent settlement. The Division believes a Board decision is required to resolve the matter.

ARGUMENT

The foregoing rather detailed recitation of the history of this case is provided to correct and clarify certain statements in Genwal's Brief. Specifically:

(1) The Division did not interrupt settlement negotiations and make new demands, but rather has continued to meet with Genwal and has by this amendment provided a thoughtful and balanced additional option for bonding;

(2) The Division did not disclose any aspect of the confidential settlement discussions or offers and makes no comment about them in this response;

(3) The time set by the Board for negotiations had expired by the time of the May hearing (the Board did not provide for settlement to continue through June 21, 2011);

(4) Genwal was not *compelled to concede* that the Division could amend the Division Order and Genwal was advised of the nature of the amendment prior to its consent; and

(5) The Amended DO-10A serves the legitimate purpose of providing an alternative option for bonding that, if approved by the Board, is to the advantage of Genwal and is not offered for posturing, or to prejudice Genwal before the Board.

Beyond the foregoing unfounded and irrelevant allegations, Genwal's objections to the Amended Division Order are primarily the same as those made in its Brief filed in response to the original DO-10A and/or its Reply Brief. The Division refers the Board to the Division's Brief Regarding Identified Legal Questions filed November 15, 2010 and the Division's Response to Genwal's Brief filed December 1, 2010.

The Division will briefly address the additional arguments made by Genwal in opposition to the Amended Division Order as follows.

I. THE AMENDED DIVISION ORDER COMPLIES WITH THE REQUIRED PROCEDURES FOR ADJUSTING BOND AMOUNTS.

A. The Procedural Rules Were Followed.

Genwal admits that this objection is the same as the objection it made in its Reply Brief to the original Division Order. Genwal does not raise this as a new argument that applies to the Amended Division Order in any new or different way. However, since this argument was not made in Genwal's opening Brief, but only raised in Genwal's Reply

Brief, the issue was only addressed in the oral argument at the January Board Hearing. The Division will therefore provide this written response.

As stated at oral argument, the Division followed all of the applicable rules in revising the bonding amount and incorporated as part of DO-10A the for notice and an informal conference procedures as required when modifying a bond amount. A brief review of these actions shows that the Division did not by-pass any requirement in adjusting Genwal's.

First, the mine tragedy and resulting mine water discharge required a permit revision. The rules regarding permit revisions provide that when the permit is revised the amount of bond be reviewed for adequacy. (R645-301-830.440).

Second, due to the unanticipated flow of polluted water from the mine, to satisfy the Act the Division was required to make a completely new bond calculation to determine the amount of bonding needed for water treatment. Without attempting to re-argue the legal issues, the argument for requiring a bond for water treatment costs is briefly summarized. (1) The amount of the bond must "depend upon the requirements of the approved permit and reclamation plan" (R645-301-830.120) and "reflect the probable difficulty of reclamation, giving consideration to such factors as topography, geology, *hydrology* and revegetation potential". (R645-301-830.130 emphasis supplied). (2) The reclamation plan must "show how the applicant will comply with R645-301 and the environmental performance standards of the state program" (both require prevention of water pollution) (R645-301-541.400). Among the many R645-301 provisions, are requirements that the reclamation plan be designed to minimize erosion and water pollution on and off the site (R645-551.140). (3) The hydrologic section of R645-301

includes among the reclamation requirements that all permanent sedimentation ponds, diversions, impoundments, *and treatment facilities* meet the requirements of R645-301, which expressly requires that when drainage control and other reclamation practices are not adequate to prevent water pollution, the operator will "utilize *and maintain* the necessary water treatment facilities". (R645-301-731.121). The bond amount required includes the cost of treating the water discharge in order to comply with water quality standards post-mining. The Division will not repeat here all of the many citations in its previous Briefs where it demonstrates that the performance standards and R645-301 rules require protection of the water quality and hydrologic regimes both during and after completion of mining. For the purposes of responding to Genwal's procedural objections to the AmendedDO-10A, it can be assumed that the Division found reason to adjust the bond amount and thus issued the Division Order.

Third, the Division complied with the relevant rules and addressed the lack of information regarding costs of water treatment and future treatment plans. Despite being requirements of DO-10A and continued requests and demands of Genwal, the Division was not, and currently has not been, provided sufficient information about the current costs of treatment or plans and costs for a long-tem treatment facility. This is due in part to Genwal's denial that there will be a long-term water pollution problem. Thus, from an independent Division assessment, the initial bond amount sufficient to cover treatment costs was determined to be $320,000.00. To the extent DO-10A and Amended DO-10A do not establish a final dollar amount, and either expressly or impliedly provide that the Division will adjust the bond amount as better information is provided, this allowance for adjustment is consistent with the rules. R645-301-830.400 provides that the "amount of

the bond or deposit required and the terms of the acceptance of the applicant's bond will be adjusted from time to time."

Fourth and finally, the rules provide the opportunity for Genwal (or others) to participate in an informal conference and request a reduction or to object to the amount of the bond when a bond amount is to be adjusted (R645-301-420 and 430). DO-10Ar and Amended DO-10A are consistent with this requirement since they expressly incorporate the right and opportunity for this notice and informal conference. Amended DO-10A provides that when a surety in the amount found necessary to meet the actual costs of operation of the water treatment is proposed either by Genwal, or if they fail to provide the information required proposed by the Division, there will be notice given and opportunity for a hearing before the amount is finalized.

Thus, the Division complied with all the procedural requirements of the rules despite the refusal of Genwal to cooperate. While the onus to provide the information required to determine the bond amount is on the operator, Genwal has failed and seeks to avoid facing this requirement by denial of potential liability.

B. The Division Has Provided a Reasonable Estimate of the Bond Amount.

Genwal objects to the failure of the Division to set a specific amount of bond. Again this is an objection to the Division Order that was raised earlier and is not an objection to specific aspects of the Amended Division Order. Although this issue was responded to at oral argument, the Division will provide a brief recap of the argument in light of Genwal's continuing inaction since the first hearing.

It is Genwal's refusal to provide estimates of the long-term treatment costs that prevents the Division from making a more specific estimate of the final bond amount. A Board decision may be required on the legal issues in order to obtain the additional information needed to determine a more specific bond amount.

Genwal objects to requests for details on costs of treatment by claiming that it is still adjusting its treatment methods and costs and that the current chemical treatment system is temporary and will be replaced with a permanent treatment plan (if needed). The Division set the surety obligation as the amount sufficient to cover the specific amount of $320,000 per year in water treatment operating costs based on the best information it had. The Division provided Genwal with the option to justify a lower amount based on verifiable numbers.

New amounts that are substantially below the earlier estimates by the Division were provided shortly before the Division issued Amended DO-10A. The Division is still evaluating the submitted information to verify whether the cost estimate is reasonable and viable.

The Division and Genwal agree that if there is a long-term water pollutional discharge that the current treatment facility is inadequate. A long-term or permanent facility will need to be designed and constructed and will most likely have different costs from the current operation. Since Genwal desires more time to see if there will be a need for this long-term treatment facility, they have not yet provided plans or costs for this long-term facility. Consequently, as the Division is without a basis to make a determination, the Amended DO-10A cannot be specific as to these numbers.

These various opportunities for Genwal to assist the Division in arriving at an accurate number are in-line with and not contrary to the rules. Genwal's claim that the resulting lack of a 'hard and fast' number precludes it from insisting on *any* bond is illogical. Since Genwal refuses to acknowledge that there may be a long-term obligation and fails to provide data about long-term treatment facility costs, the Division cannot provide more specific numbers until the Board issues a decision regarding the liability of Genwal for the costs of treatment and the need to bond for those costs rather than leaving the State of Utah susceptible to paying such costs.

II. THE AMENDED DIVISION ORDER PROPOSES AN ADDITIONAL OPTION FOR GENWAL TO SATISFY ITS BONDING OBLIGATION THAT IS AUTHORIZED BY CURRENT LAW.

The written contract option as provided for in the Amended DO-10A for incremental funding over a period of years has not been used before in Utah, but does not require new rules or statute changes.

The optional bonding agreement provides for a combined use conventional bonding in the form of an increasing amount of cash or other collateral bonding payments together with an operator guarantee. During the interim period, the amount of collateral bonding will be insufficient to fully cover long-term costs of treatment in the event Genwal bankrupts. In order to provide a full financial buttress against the potential public liability during the interim period when less than full collateral bonding is provided, the optional agreement requires that Genwal's parent company Murray Energy

be a party or guarantor. This assumes that Murray Energy's financial strength will be sufficient to add to assurances during this interim period.

Murray Energy objects to this requirement to sign the agreement, but at the same time assures the Division that it has no reason to require *any* bond since Genwal is part of Murray Energy and Murray Energy would never let the mine obligations go unmet. The requirement for Murray Energy to be a signatory just cements this premise that they will assume responsibility. Contrary to Genwal's objections the requirement for a parent corporate guaranty is not arbitrary or contrary to statute, but is reasonable and consistent with the obligation and liability imposed by SMCRA on owners and controllers as "agents" of the operator. *See, United States v. Dix Fork Coal Co*, 692 F.2d 436 (6th Cir. 1982); 30 CFR 774.11(f). Operator self-bonding by the corporate owner is not unusual nor improper. Since Crandall Canyon is not an operating mine, and Genwal does not own or operate any other mines, it most likely would not qualify for an operator bond without Murray Energy's signature.

Genwal also objects to the Division requiring bonding during the interim period for the day-to-day operating costs. Normally it is true that mine operating costs would not be included in a bond calculation since in the event of a cessation, the operating expenses would cease and the costs would not continue. However, this objection fails to appreciate the non-ceasing nature of the gravity discharge and need for continuous treatment for a long-time. If Genwal ceases operations and the discharge of polluted water continues, the need for long-term water quality treatment by the Division becomes paramount. The money to pay these costs must be immediately available to the Division to avoid liability to the State. Achieving this goal is the essence of Amended DO-10A.

The Amended DO-10A bonding option relies on a combination of the conventional bonds currently authorized by Utah statutes and approved by OSM. The only variance is the allowance of a period of time to buildup the full bond amount. This stepped-up annual payment aspect of the Amended DO-10A is similar to Tennessee's method of providing bonding for unanticipated pollutional discharges that was approved by OSM in 2007. (30 CFR part 942; Federal Register Vol. 72, No. 41 March 2, 2007 pages 9616 to 9620). Tennessee allows an operator to make periodic payments over a period of ten years in order to achieve full bonding for long-term water treatment costs. This same federal approval notes that other states including Pennsylvania also allow a period of annual payments to be used in order to establish a fund that is sufficient to cover long-term water treatment costs.

III. THE DIVISION ORDER AND AMENDED DIVISION ORDER ARE NOT AN ALTERNATIVE BONDING SYSTEM REQUIRING APPROVAL UNDER SMCRA.

Genwal argues that the Amended DO-10A would constitute an Alternative Bonding System ("ABS") requiring either state legislation or OSM approval or both. The Amended DO is not an ABS as that term is used in SMCRA.

The types of bonds permitted under SMCRA were discussed by the court in *Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Kempthorne*, 497 F.3d 337 (3rd Cir. 2007). In the process of upholding the need to provide bonding for treatment of

water pollution associated with mine discharges,[2] the case analyzes and explains in much detail the distinction between an ABS and the CBS:

> "A convention bonding system ("CBS"), authorized by 30 U.S. C. § 1259(a), is sometimes referred to as a "full cost" system because the cost of the bond is not discounted or supplemented by another source. Rather the operator must pay the entire cost of the bond needed to complete reclamation in the event of forfeiture.
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> . . .
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> An alternative bond system ("ABS"), authorized by 30 U.S.C. § 1259(c) is a collective risk spreading system that draws in part on a bond pool to cover the reclamation liabilities of each individual mines mine site. An ABS allows a State to discount the amount of the required site-specific bond to an amount that is less than the full cost needed to complete reclamation in the event of forfeiture. (Supra at 341)

An 'alternative bonding formula' or 'alternative bonding option' as the those terms are used in the Division's Motion to Amend DO-10A, are not the same as an alternative bonding system under SMCRA for which OSM must provide approval. The Division's use of the term "alternative bonding" refers to an alternative to the bonding required in the *original DO -10A*. An ABS as the term is used in SMCRA is used to describe bonding arrangements that do not rely on conventional bonding systems and usually include a state-funded or subsidized bonding system.

The Division's proposal is an operator funded, and site specific bond and does not involve collective risk spreading or less than full cost bonding. The Division's proposal to allow a written contract, departs from conventional bonding only by allowing an interim period during which payments are to be made to establish the full amount of the

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[2] The case provides significant support for the Division to require bonding for water pollution treatment costs. (". . . SMCRA demands that 'sufficient money' will be available 'at any time' a discharge from an ABS bond forfeiture site must be treated. 30 C.F.R. § 800.11(e) (1). The plain language of this provision requires that Pennsylvania demonstrate the adequate funding for mine discharge abatement and treatment at all ABS forfeiture sites. *Pennsylvania Sportsmen, 's Clubs* at 354)

bond. As noted, during this period there is also an operator's self-bond guaranteed by Murray Energy.

The OSM decision approving of the Tennessee program for bonding to cover treatment costs for post-mining pollutional discharges allows a similar interim payment scheme and also approved the use of trust funds or annuities. In the matter of the Tennessee Rule, the OSM stated that the provision in that rule allowing "for the use of trust funds or annuities in Tennessee [is] an alternative bonding system (ABS) as provided for in section 509(c) of the Act." (March 2, 2007 Federal Register, Vol.72, p. 9619)

However, the DO-10A both as originally written and as amended does not provide for the use of "trust funds or annuities." If the use of these types of financial instruments were to be requested or were determined to be advantageous to the State, then OSM's approval and legislation likely would be required. The option of amending the statute and rules to allow for eventual use by Genwal of trust funds or annuities is not precluded by upholding the Amended Division Order. There is sufficient time (as much as ten years) for any required legislation, rule-making and OSM approval, if necessary, to allow the use of these financial instruments if they are determined to be advantageous for long-term water treatment obligations.

Although other financial instruments were originally contemplated as a possibility, neither the Amended DO-10A nor the original Division Order require the use of either trust funds or annuities but rely on conventional bonding.

Genwal also cites OSM's denial of a proposed change to the Wyoming Coal Program (to allow for more flexible bonding), as evidence of the need for OSM approval

before the Amended DO-10A can be used. In the Wyoming proposal, however, the State's proposed rule was explicitly designed to allow for an Alternative Bonding System and did not rely on conventional bonding. The OSM stated that Wyoming's proposed rule change was too general to meet the standards for approval. Wyoming did not identify a specific alternative bonding system in its proposed rule. Rather, it allowed a permit applicant to submit an unidentified alternative method of financial assurance that had not yet been approved for Wyoming. OSM found this open-ended arrangement did not satisfy the standard of being no less stringent that the federal rule. This Wyoming decision does stand for the proposition that an ABS proposed under SMCRA does require prior approval, but it does not mean that the Amended DO-10A requires OSM approval since the Division Order as amended relies on conventional bonding.

In any event, it is hard to understand why Genwal raises this objection. It should be up to the Board and OSM to determine if the offered bonding option meets the statutory requirements. If it does, the option eases the burden on Genwal. If it does not, the Division has not substituted the original Division Order's bonding requirement with the written agreement option, but only provided it as an alternative. Even if the Board elects to condition the use of the option on OSM approval or other conditions, Genwal is not harmed by an Order allowing the Division to Amend DO-10A so it may offer this option, subject to Board approval and such additional precautions as the Board may find appropriate. The Division notes that if the Board believes that the use of trust funds or annuities would be a useful tool, it is in a position to propose legislation or rule-making as appropriate to make that option available to Genwal and others in the future.

The motive for Genwal's argument appears to be based on a belief that the Board does not want to impose full-cost bonding and if there is 'no less painful option' it will not require any bond. This thinking misplaces the Board and Division's obligations under the Utah Coal Act. If there is any question, the Board should elect not to use this option and rely on DO-10A as originally issued. The Board must abide its duty to the citizen to protect the environment and avoid liability for water treatment. If upon the conclusion of the trifurcated hearings it finds that the pollutional discharge is likely to continue over the long-term, and if the Board believes that the Amended Division Order does not meet the statutory requirements, then it should require posting of the entire bond amount.

CONCLUSION

The Amended DO-10A, with the option of a written contract to provide bonding conditional on the continued water quality problems, is put forth for the reasons that it avoids the adverse financial harm that may result from having to provide a full cost bond at one time and allows a period for increasing the bonding while continuing to provide water treatment. In addition, it provides additional time to evaluate the potential need for long-term treatment, to design a long-term treatment plan while protecting the citizens of the state from liability if the predictions of the Hydrologic Evaluation Report are correct and long-term treatment is required.

To ignore the report and the potential costs is to abrogate the statutory duties of the Division. As the court in *Pennsylvania Federation of Sportsmen's Clubs*, supra stated "SMCRA's bonding program is designed to provide further assurance of 'complete reclamation of mine sites' . . . Under SMCRA the bonds collected must be sufficient to

assure the completion of the reclamation plan if the work had to be performed by the regulatory authority', i.e., the State." (Supra, at 341)

The Board's first duty is to assure such a bond is in place. The Division has asked for nothing other than conventional bonding. The Amended DO-10A provides for an interim period to continue to assess the long-term needs and to allow the ramping-up of a bond amount to address the problem if the assessment is correct. Since the written contract could potentially result in the Division being without full bonding for the entire costs of long term treatment if Genwal were to cease to operate or be without assets during the interim period, the guarantee of Murray Energy is required.

There is nothing prejudicial about this amendment to the DO-10A. The proposed option of a written contract is reasonable, and is legally supportable as an alternative to immediate full cost bonding put forth in the original DO-10A.

Submitted this 20th day of July, 2011

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing DIVISION'S RESPONSE TO GENWAL'S BRIEF IN OPPOSTION TO THE AMENDED DIVISION ORDER was hand delivered, or mailed via U.S. mail, postage prepaid AND SENT BY EMAIL, to the following on this 20th day of July, 2011:

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